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CANADA'S REFUGEE STATUS  
DETERMINATION SYSTEM



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## CANADA'S REFUGEE STATUS DETERMINATION SYSTEM

Margaret Young  
Law and Government Division

July 1993  
*Revised January 1997*



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## CANADA'S REFUGEE STATUS DETERMINATION SYSTEM

### BACKGROUND<sup>(1)</sup>

Although Canada signed the *Convention Relating to the Status of Refugees* (and its Protocol) in 1969, procedures for determining claims to Convention refugee status made within Canada remained informal and discretionary until the current *Immigration Act* came into force in 1978. At that time, the number of claims per year was low and the system then devised was administratively adequate for the job, although it was repeatedly criticized for its failure to give claimants an oral hearing.

In the 1980s, however, the number of claims began to mount, partly in response to legitimate refugee pressures around the world and partly because it became generally known that the cumbersome system then in place offered opportunities to come to Canada - and remain here for lengthy periods - that were not available through normal immigration channels. As the number of claims grew, from 3,450 in 1981 to 6,100 in 1983, to 25,000 in 1987, it became clear that the system as originally devised was no longer adequate. In April 1985, the Supreme Court of Canada declared unconstitutional an important part of the system, compounding the structural bottlenecks. The need for reform had become clear and pressing.

Designers of the system as enacted in 1988 (in force 1 January 1989) had to balance a number of factors. The law had to embody the essence of the United Nations *Convention Relating to the Status of Refugees*, which requires signatory states not to return people in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened

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(1) For a discussion of the Convention refugee determination system prior to Bill C-55, which came into force in 1989, see *The Convention Refugee Process in Canada: Its Reform*, CIR 86-26E. Refugees also seek asylum in Canada by applying from outside Canada at consular facilities under special immigration rules. Some of the issues involved in this form of admission are discussed in *Humanitarian Immigration and Canadian Policy*, CIR 80-10E. Both documents are available from the Research Branch, Library of Parliament.

on account of their race, religion, nationality, membership in a particular social group or political opinion. At the same time, the government felt, and continues to feel, that the law had to be stringent enough to counteract the perception (and to some degree, the reality) that Canada had lost control of her borders. Without a reassertion of control, the government feared that public support for all immigration and refugee programs might be endangered.

Three major studies and a parliamentary committee report preceded the introduction of legislation to amend the *Immigration Act*, Bill C-55,<sup>(2)</sup> in the House of Commons in May 1987. The most comprehensive of these studies was Rabbi Gunther Plaut's *Refugee Determination in Canada*. Rabbi Plaut - indeed all commentators - called for reform of the system and stressed the importance of an oral hearing for claimants.

Bill C-55 was controversial and required 14 months to pass both the House and the Senate. Significant changes to the system were made again some four years later by Bill C-86, most of which came into force on 1 February 1993.<sup>(3)</sup> A number of those changes also proved controversial. Further changes were made in 1995 with the passage of Bill C-44.

Most commentators agree that Canada has one of the best refugee determination systems in the world. The system must be understood, however, within an overall context in which deterrence from entry into the system is a significant governmental goal. This goal is implemented by such methods as visa controls on refugee-producing countries, training overseas airline personnel in the detection of fraudulent documents, the stationing of Canadian control officers abroad in key locations, sanctions on transportation companies, and the "safe country" provisions. This tension between an inland refugee determination system that is a model for the world and an overall policy of control and deterrence explains much of the ongoing antagonism between the government and advocates for refugee claimants and potential claimants.

The inland refugee determination process should also be seen in the broader context within which Canada assists refugees by contributing financially to the United Nations High Commissioner for Refugees, by participating in food, medical and other emergency aid, by delivering foreign aid to developing nations and through its peacekeeping duties.

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(2) S.C. 1988, c. 35.

(3) S.C. 1992, c. 49.

## THE IMMIGRATION AND REFUGEE BOARD

All quasi-judicial immigration matters in Canada are handled by the Immigration and Refugee Board (IRB), the largest administrative tribunal in Canada. The head office of the Board is in Ottawa but its operations are decentralized across the country. The Board has three divisions: the Convention Refugee Determination Division, the Immigration Appeal Division and the Adjudication Division.<sup>(4)</sup> The Refugee Division hears claims to refugee status made within Canada. The Appeal Division deals with family class sponsorship appeals, appeals of removal orders for permanent residents and Convention refugees, and appeals of denial of entry or landing to holders of valid visas. Adjudicators employed in the Adjudication Division preside over immigration inquiries and detention reviews.

At the head of the Board is a Chairperson and an Executive Director, both appointed by the Governor in Council, as are all Board members. Refugee Division members may be appointed on a full-time or part-time basis, for terms up to seven years. As a result of several highly-publicized incidents in which Refugee Division members were criticized for inappropriate behaviour, and following public urging by the Chairperson, the Act was amended (as part of Bill C-86) to provide for an inquiry process conducted by a Federal Court judge.<sup>(5)</sup> This process is instigated by the Minister upon the recommendation of the Chairperson, following which disciplinary measures are recommended to the Governor in Council. The process has been invoked once over alleged conduct by the Board's deputy chair, Michael Schelew. The matter was settled in December 1994, just as the inquiry was about to start.

The IRB reports to Parliament through the Minister of Citizenship and Immigration.

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(4) The adjudication function was transferred from Employment and Immigration Canada to the Board by Bill C-86.

(5) Bill C-49, the Administrative Tribunals (Remedial and Disciplinary Measures) Act, given first reading in the House of Commons on 14 June 1996, would repeal these provisions and replace them with virtually identical provisions that would apply to a number of tribunals.

## ACCESS TO THE SYSTEM

### A. General

Not everyone has the right to make a refugee claim in Canada. Prior to the amendments introduced by Bill C-86, in force 1 February 1993, the initial screening process for those without status in Canada took place within the structure of an immigration inquiry presided over by an adjudicator, at that time an employee of Employment and Immigration Canada, with a member of the Refugee Division in attendance. These decision-makers decided whether the person was eligible to enter the refugee determination system and, if so, whether there was a credible basis for the claim. Legal counsel was paid for by the federal government at this stage of the process. Both decision-makers had to agree before the claim could be rejected on the grounds of eligibility or credibility. If one person found it to be eligible and credible, the claim proceeded to a full hearing before the Refugee Division.

Bill C-86 eliminated the credible basis test and the inquiry structure. It retained the eligibility criteria, but transferred their application to senior immigration officers acting administratively, who also deal with the immigration aspects of the case, provided these are routine.<sup>(6)</sup> Paid counsel was eliminated; if counsel is present for the examination, the practice is to admit them, but officers are instructed not to delay in order to facilitate representation.

### B. Eligibility

Claimants are denied access to the refugee determination system on the basis that they are *not eligible* if they:

- have been recognized as a Convention refugee by another country, to which they can be returned;
- came to Canada, directly or indirectly, from a country (other than their country of nationality or habitual residence) that has been prescribed by the Governor in Council as a country that complies with Article 33 of the Convention (that is, a country that does not return people directly or indirectly to the frontiers of countries where they fear persecution on the named

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(6) Inadmissibility on criminal and security grounds are referred to an adjudicator.

grounds); *it is important to note that there is currently no list in place; the "safe country" provisions are therefore not in effect;*<sup>(7)</sup>

- are making a repeat claim without having been out of Canada for 90 days;
- have already been determined in Canada or by a visa officer abroad to be a Convention refugee; or
- have been determined by an adjudicator in an inquiry to be security risks, serious criminals, or war criminals, and the Minister certifies that they are a danger to the public in Canada or that it is not in the public interest to hear the claim.

Bill C-44 in 1995 made several refinements to the eligibility rules. With regard to ineligibility on criminal grounds, the bill clarified that a permanent resident convicted of an offence with a maximum term of imprisonment of 10 years or more is ineligible to make a refugee claim. (As a result of a drafting technicality in Bill C-86, this had not been clear.) The bill also provided that the question of ineligibility on criminal grounds can be raised at any time in the course of proceedings. A hearing already commenced by the Refugee Division is suspended, pending an adjudicator's decision on eligibility.

Bill C-44 also provided that if a claimant has been found eligible to make a claim in a decision based on fraud or misrepresentation of a material fact, a senior immigration officer shall determine that the claimant was ineligible and that any decision by the Board be set aside. The bill also introduced additional provisions to deal with the problem of multiple claims.

### **C. Judicial Review and Removals Following Screening**

Claimants found to be inadmissible to Canada and ineligible to make refugee claims are denied access to the refugee determination process, and the senior immigration officer (or the adjudicator in criminality and security cases) issues a conditional removal order. Claimants may apply to the Federal Court - Trial Division for leave to apply for judicial review of both the removal order and the decision of the senior immigration officer regarding eligibility, but have no right to remain in Canada pending a decision, except during a seven-day stay of the execution of the removal order. All applications for leave to apply for judicial review are decided by one judge,

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(7) For a fuller discussion of this provision, see page 15.

without personal appearance by the parties, although this may be requested for special reasons. There is no appeal from a denial of leave to apply for review.

The grounds for judicial review are those set out in the *Federal Court Act*; they are the same as the grounds for review of decisions of the Refugee Division. They are that the body or person:

- acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- erred in law in making its decision, whether or not the error appears on the face of the record;
- based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it;
- acted, or failed to act, by reason of fraud or perjured evidence; or
- acted in any other way that was contrary to law.

Applicants who succeed in their leave applications are able to appeal the actual decision on judicial review to the Federal Court of Appeal only if the Trial Court Judge whose decision it is certifies at the time of rendering judgment that a serious question of general importance is involved.

The country to which a claimant can be removed will vary depending on the reason for the exclusion. For example, those found ineligible on the basis that the country from which they claim persecution is on the prescribed list could only be returned there, and Convention refugees can be removed to the country that had been protecting them prior to their arrival in Canada.

## **THE REFUGEE HEARING**

### **A. Referral to the Refugee Division**

Claimants found to be eligible to make a claim are issued conditional removal orders (which become effective only when all further proceedings are completed and the decision

has been against the claimant) and are referred to the Refugee Division for a determination. People who are legally in Canada may also make refugee claims. For those people, no removal orders are issued.

At the time of referral, the Minister may request that the information related to the case filed with the Board be provided to him or her, following which, the Minister may notify the Board of an intention to participate in the hearing. (Participation is always through a representative.)

### **B. The Nature of the Hearing**

The Act provides that all proceedings before the Refugee Division shall be as informal and expeditious as is consistent with fair treatment. The Division is not bound by any legal or technical rules of evidence and may base a decision on evidence it considers credible and trustworthy in the circumstances of the case. The expertise of the Division is recognized by the specific permission given it to take notice of any information or opinion within its specialized knowledge, provided that it first gives notice of such facts, information or opinion to the Minister and the claimant and offers an opportunity for them to respond.

The Refugee Division is assisted at the hearing by a Board employee called a refugee claim officer (RCO), formerly called a refugee hearing officer (RHO). Such officers may call and question claimants and any other witnesses, present documents and make representations. The function of the officer has always been subject to various interpretations, and at one point became quite controversial. The Hathaway Report recommended that restrictions be placed on RHOs' information-gathering activities in the refugee determination process and that RHOs' objective, impartial role in hearings be emphasized.<sup>(8)</sup> In the longer term, Professor Hathaway recommended a re-ordering of Board structures so that the work of the RHO would primarily take place before the hearing.

On 3 March 1995, the Board announced that RHOs would be renamed Refugee Claim Officers (RCOs) and that their investigatory and case preparation role prior to hearings

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(8) *Rebuilding Trust, Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada*, James C. Hathaway, December 1993.

would be emphasized. All research would be under the supervision of a member, who would become involved with files from the very beginning.

Professor Hathaway had recommended that RHOs should have only a very small role, if any at all, to play in a hearing. The Board, however, announced that, while members would become more engaged and active participants in the hearing process, RCOs would remain in the hearing room as a source of expertise for the panel, and would question claimants at the panel's direction. The Board considered that this was particularly likely to happen when matters relating to the exclusion clauses and to the credibility of the claimant arose. Since credibility is often in issue in unexpedited claims, it remains to be seen just how the role of the RCO will develop and whether critics of the adversarial elements of the current system will be mollified.

Both the Minister and the claimant have the right to be represented at the proceedings by counsel or an agent. In most provinces, claimants are eligible for provincial legal aid. Proceedings are normally *in camera*. If, however, a member of the public asks to attend, permission will be granted unless the Refugee Division is satisfied that there is a serious possibility that the life, liberty or security of any person would be endangered by a public hearing. A representative or agent of the United Nations High Commissioner for Refugees has a right to attend any proceedings as an observer.

Certain provisions in the law control the extent to which the refugee hearing is allowed to become adversarial. Although the Minister may present evidence in all cases, he or she has a right to question the claimant and other witnesses and make representations only following notice that the exclusion or cessation clauses of the Convention are in issue (see below). In all other cases, the Refugee Division must give its consent before the Minister may question the claimant and other witnesses and make representations.

If the Minister does not advise the Refugee Division of an intention to participate in the hearing, claims may be decided positively, that is, in the claimant's favour, in the expedited process by a single member without a hearing. This provision obviates, in clear cases, the need to schedule a multi-party hearing - the claimant, counsel, an interpreter, a refugee claim officer and two members - and thus saves considerable time and resources.

If a hearing is held, two members currently constitute a quorum, unless the claimant has consented to a hearing before just one member. On 2 March 1995, the Minister of Citizenship

and Immigration announced that legislation would be introduced to institute panels of one member, except for complex cases, where the Chair would have a discretion to assign more than one. Bill C-49, noted previously, would effect this amendment to the *Immigration Act*.

### C. The Decision and Its Consequences

In making the decision regarding refugee status, Refugee Division members must apply the definition of Convention refugee contained in the *Immigration Act*, and as interpreted by the courts, to the facts presented by the parties and discovered as a result of its own research. As noted, the Board may also rely on any information or opinion within its specialized knowledge, provided that it first gives notice of such facts, information or opinion to the Minister and the claimant and offers an opportunity for them to respond.

With the amendments to the Act made by Bill C-86, guidelines issued by the Chairperson of the Board were given a statutory basis. Their purpose is "to assist the members of the Refugee Division and Appeal Division in carrying out their duties under this Act."<sup>(9)</sup> They also serve to foster consistency in what is a very decentralized system.

Members of the Board are independent decision-makers and IRB guidelines are not legally binding in any strict sense. They do, however, form a well-researched, succinct statement of the issues and relevant cases in the past that are germane to the topic under discussion. Members have been instructed, therefore, that they need compelling or exceptional reasons for deviating from the principles they contain.<sup>(10)</sup> The first guidelines pursuant to the new statutory authority were issued in March 1993 (updated in November 1996) and were entitled "Women Refugee Claimants Fearing Gender-Related Persecution." The second, "Civilian Non-Combatants Fearing Persecution in Civil War Situations," were released in March 1996, and the third "Guidelines on Child Refugee Claimants" in August 1996.

Written reasons must be given for all refusals of refugee status by the Refugee Division, and may also be requested, by either the Minister or claimants, for positive decisions. If both members agree that there was no credible or trustworthy evidence on which the claimant

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(9) *Immigration Act*, section 65(3).

(10) "Procedures for the Guideline-Making Process - s. 65(3) and (4) of the *Immigration Act*," Memorandum from the Chairperson of the Immigration and Refugee Board, 9 March 1993.

could have been found to be a Convention refugee, they are required to state in the decision that there was no credible basis for the claim. The implication of such a finding is that the conditional removal order is stayed for only seven days following the decision. The majority of all other claimants found not to be Convention refugees have a right to remain in the country until their applications for leave for judicial review and any subsequent proceedings have been completed.<sup>(11)</sup>

Prior to the amendments to the law made by Bill C-86, both members had to agree in order to reject a claim.<sup>(12)</sup> That is, if one member supported the claim, the person was recognized as a Convention refugee. Now, split decisions are decided against the claimant in three circumstances. These are: (a) that the claimant, without valid reason, destroyed or disposed of identity documents that were in his or her possession; (b) that the person, since making the claim, had visited the country of claimed feared persecution; or (c) that the country of claimed feared persecution is a country prescribed by the Governor in Council to be a country that respects human rights. (To date, no such countries have been prescribed.) In order for the new rule on split decisions to be applicable, both members must be satisfied that one of the three circumstances exists.

If the decision of the Refugee Division is that the person is not a Convention refugee, the person may make an application for leave to apply for judicial review.<sup>(13)</sup> If this is granted, the grounds for intervention in the decision are as reproduced on page 6 above. It will also be remembered that for a further appeal to the Federal Court of Appeal to be permitted, the Trial Division Judge must certify at the time of judgment that a serious question of general importance is involved. For those few cases that do reach the Federal Court of Appeal, a further appeal to the Supreme Court of Canada is possible, with the permission of that court.

If the Refugee Division determines that a claimant is a Convention refugee, the conditional removal order does not become effective and the person and any dependants are eligible

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(11) Refused claimants about whom there are criminal or security concerns also receive only a seven-day stay.

(12) As noted above, Bill C-49 would reduce the normal panel from two members to one member.

(13) The Minister may also make an application for leave to review positive decisions, even in cases in which his or her representative did not take part in the proceedings before the Refugee Division.

to apply for permanent residence. Certain refugees are ineligible for permanent residence. The most important of these are:<sup>(14)</sup>

- those who have been recognized as Convention refugees in another country and would be allowed to return there;
- nationals or citizens of any country other than the one in which the person fears persecution;
- refugees who have permanently resided in another country (other than the country where they fear persecution) and who would be allowed to return to that country;
- refugees, or any dependant for whom landing is sought, who are criminals, security risks or war criminals; or
- applicants who do not possess a valid and subsisting passport or travel document or a satisfactory identity document.

The last criterion became part of the Act with the C-86 amendments and was designed to deter the use of fraudulent documents and the destruction of fraudulent or *bona fide* documents by those coming to Canada to make refugee claims, as well as provide an assurance of true identity. The provision resulted in a significant number of people who could not be landed, primarily but not exclusively Somalis.

In November 1996, the government announced its solution to the growing number of recognized refugees left in limbo because they could not furnish documentation satisfactory to immigration officers. It proposed to create the Undocumented Convention Refugees in Canada Class (UCRCC); membership in the class was limited to refugees from Somalia and Afghanistan for whom the only impediment to landing was a lack of satisfactory documents, provided that five years had elapsed from the date on which the applicant had been recognized as a Convention refugee.

Interested parties had a 30-day period within which to comment on the proposal. Most, including the affected groups, opposed it on the grounds that the wait was too long, that the starting point for computing the waiting period (actual recognition as a refugee) discriminated

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14 Prior to the amendments made by Bill C-86, refugees could also be denied landing on health grounds or on the grounds that they would be unable to support themselves. Both of these impediments have now been eliminated. Another change permits dependants abroad to be processed concurrently with the refugee in Canada. Previously, recognized refugees were required to go through the time-consuming landing process and actually become permanent residents before they could sponsor family members overseas.

against those whose claims had taken longer than the norm, and that the category should not be restricted to the two groups. The House of Commons Standing Committee on Citizenship and Immigration held hearings on the proposed regulations and released a report in mid-December 1996. It made a number of recommendations, the most important of which was that the waiting period for permanent residence should be lowered to two years. In January 1997, however, the Minister confirmed that the regulations as originally conceived would be implemented at the end of the month.

#### **D. Cessation and Vacation of Refugee Status**

The Minister may apply to the Refugee Division for a determination that a person has ceased to be a Convention refugee. In making that determination, the Division will apply the criteria in section 2(2) of the Act if:

- persons voluntarily re-avail themselves of the protection of the country of their nationality;
- persons voluntarily re-acquire their nationality;
- persons acquire a new nationality and enjoy the protection of the country of that nationality;
- persons voluntarily re-establish themselves in the country that they left, or outside of which they remained, by reason of fear of persecution; or
- the reasons for the fear of persecution in the country that they left, or outside of which they remained, cease to exist.<sup>(15)</sup>

The power of the Minister to apply for a reconsideration of a decision on the basis of changed circumstances is an aspect of the system that refugee advocates would like to see duplicated in the case of rejected refugee claimants. Such a provision would permit claimants refused by the Board because of circumstances that applied at the time of the refusal to present a case that, in the interim, the situation had worsened. It would also permit consideration of significant new evidence that came to light after the initial decision.

The Minister may also make an application to the Refugee Division, with leave of the Chairperson, to reconsider and vacate a determination that a person is a Convention refugee on

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(15) There is an exception for people who establish compelling reasons arising out of their previous persecution for refusing to seek the protection of the country that persecuted them.

the ground that the determination was obtained by fraudulent means or misrepresentation, suppression or concealment of any material fact, whether exercised or made by that person or by another.<sup>(16)</sup> Even if it finds fraud or misrepresentation, however, the Division may reject the Minister's application if it decides that there was other sufficient evidence on which the determination was or could have been based.

Hearings by the Refugee Division to decide the above matters are fully adversarial in nature. Three members hear the application and in the case of a split decision that of the majority prevails. As at the hearing of claims in the first instance, written reasons are required if the decision is against the refugee, and may also be requested for a decision in the refugee's favour. The decision of the Division may be the subject of an application for leave to apply for judicial review to the Federal Court on the same grounds as those described previously.

## LANDING OF REJECTED REFUGEE CLAIMANTS

For refugees accepted by the Refugee Division, the future is clear: most become permanent residents. At first blush, the future of rejected claimants should also be clear - removal from the country. In many instances, however, removal does not happen. This section of the paper will deal with the circumstances under which claimants may legitimately be permitted to stay in Canada even though their refugee claim has been rejected.<sup>(17)</sup>

### A. The Post-Determination Refugee Claimants in Canada Class

Regulatory changes made at the same time as the amendments to the Act made by Bill C-86 created a new designated class called the Post-Determination Refugee Claimants in Canada Class (PDRCC), comprising refused claimants who would face serious harm should they be returned (other than refused claimants found to lack a credible basis for their claim). The

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(16) Following the amendments made by Bill C-44, decisions relating to eligibility that are found to have been based on fraud or misrepresentation of a material fact can be set aside upon notice to the Refugee Division. There is no hearing.

(17) Rejected claimants may also stay in Canada for other less worthy reasons; for example, they may go underground, they may commit crimes and be in custody, or there may not be sufficient departmental resources to remove all those who should be removed.

creation of the class gave a legal basis for the application of criteria that had been administered as a matter of policy prior to this time. Claimants who meet the criteria for membership in this class are eligible to be landed in Canada. The criteria are stringent. To be a member, a person must be an immigrant in Canada:

who if removed to a country to which the immigrant could be removed would be subjected to an objectively identifiable risk, which risk would apply in every part of that country and would not be faced generally by other individuals in or from that country,

- (i) to the immigrant's life, other than a risk to the immigrant's life that is caused by the inability of that country to provide adequate health or medical care,
- (ii) of extreme sanctions against the immigrant, or
- (iii) of inhumane treatment of the immigrant.

Assessment under the criteria was originally automatic, but in December 1996 the Minister announced that, as of 1 March 1997, individuals would have to apply for the review within 15 days of the negative decision of the Refugee Division; there is no cost. The person concerned may make written submissions to the immigration officer making the decision within that 15-day period. The Minister also announced that the eligibility criteria relating to criminality would be tightened. The government created a specific position (the post-claim determination officer) and centralized assessments in Toronto, Montreal and Vancouver, overseen by headquarters personnel.

Individuals found to be members of the class, and dependants in Canada, may be landed in Canada subject to criminal and security provisions, provided they have not left Canada since the refusal of their claim and provided that they are in possession of a valid and subsisting passport or travel document or satisfactory identity document. (It will be remembered that the same requirement regarding identity documents applies to the landing of Convention refugees.) Subsequent to landing, they may sponsor dependants abroad.

As noted above, however, the criteria are very stringent.<sup>(18)</sup> When the acceptance rate proved negligible, numerous observers expressed concern that there was, in fact, virtually no safety net for rejected claimants. As a result, in January 1994 the Minister of Citizenship and

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(18) Note, for example, that the risk must be personal to the applicant. Thus, countries undergoing general strife to which everyone is exposed would not qualify. Nor would countries that are experiencing famine. Note also that the threat to the person must exist everywhere in the country.

Immigration in the newly-elected Liberal government asked two noted refugee lawyers, Lorne Waldman and Susan Davis, to investigate and report on the humanitarian and compassionate treatment of rejected refugee claimants. The resulting report, *The Quality of Mercy* (the "Waldman-Davis Report"), released in March 1994, was sharply critical of the narrow definition of the class, calling it "a highly sophisticated, special class designed to apply to almost no one."

Waldman and Davis recommended the creation of an entirely new structure to deal with humanitarian and compassionate requests. One part of this would be the designation of a new class of people affected by civil or armed conflict or oppression in their country of origin. Such people could remain in Canada if this country was their only option.

Waldman and Davis also recommended that administrative measures should be taken as soon as possible to deal with the significant numbers of rejected claimants, in particular the Chinese, Somalis and Haitians whose deportation had been deferred because of situations in their countries of origin.

#### **B. The Deferred Removal Orders Class**

In July 1994, the Minister announced the creation of a new class of people who would be eligible for landing in Canada. The Deferred Removal Orders Class (DROC) was composed of rejected refugee claimants whose deportation had been deferred for at least three years and who met certain criteria, including the requirement that they had worked legally for at least six months since making their refugee claim (or else had not been dependent on welfare). The class was ongoing; that is, membership was not confined to those in Canada as of the date of the Minister's announcement.

In December 1996, the Minister announced the cancellation of DROC as of 1 March 1997. In the Minister's opinion, the regulations had encouraged some people to try to delay their removal so that they could eventually qualify for landing as a member of the class. She said that those who qualified on the cancellation date would continue to be eligible for permanent residence.

### **C. Humanitarian and Compassionate Considerations**

Rejected refugee claimants not landed under the Post-Determination Refugee Claimants in Canada Class have yet another avenue by which they may be permitted to stay in Canada. Section 114(2) of the Act states that the Governor in Council may delegate to the Minister (and has done so) the power to exempt people from the regulations or otherwise facilitate the admission of any person on compassionate or humanitarian grounds. In turn, the Minister has delegated this authority to senior officials.

Thus, rejected refugee claimants could benefit from the policies that permit spouses to be landed from within Canada in certain circumstances, that consider situations of family dependency, and that apply to gender-related issues. Evaluation under these policies is not automatic and payment of a fee must accompany the application form.

### **THE SAFE COUNTRY CONCEPT**

One aspect of the law that has been extremely controversial from its first enactment in 1988, and which could affect a considerable number of claimants, should it become operational, is the eligibility criterion relating to the prescribed country list - the "safe countries." The policy of returning to other countries people who, quite admittedly, could be genuine refugees rests on the premise that Canada need protect only those who have no other safe haven. It also assumes that Canada is not the only country that can and does protect refugees.

The presence of the return policy in the legislation was intended to deter "asylum shopping"; that is, leaving a situation of safety and coming to Canada as a matter of personal choice. For example, employment prospects might be thought to be better in Canada; family members might reside here; the prospects of acceptance as a refugee might be thought better in this country and so on. The government insisted that these kinds of matters are an aspect of immigration, not refugee protection. The concept of asylum shopping also includes claimants coming to Canada after having been turned down by another country.

The amendments to the law made by Bill C-86 streamlined the safe country provisions considerably. Now, people are not eligible to enter the refugee determination system if they come directly or indirectly from a country prescribed by the Governor in Council as one that

complies with Article 33 (non-refoulement) of the Convention.<sup>(19)</sup> The decision on returnability - whether or not a person can be returned to that country - is now made administratively; the previous law provided for a hearing and required that the other country either accept the person or decide the claim on its merits.

In prescribing the list of countries to which people may be returned, the law directs the Governor in Council to take into account four factors:<sup>(20)</sup>

- (a) whether the country is a party to the Convention;
- (b) the country's policies and practices with respect to Convention refugee claims;
- (c) the country's record with respect to human rights; and
- (d) whether the country is a party to an agreement with Canada for such returns.

As the last factor indicates, the law now expressly provides that the Minister, with the approval of the Governor in Council, may enter into international agreements for the return of claimants to other countries, although such agreements are not a legal prerequisite to the placing of a country on the list. One of the difficulties that has prevented the implementation of the safe country provisions is the fact that there is nothing in international law to compel the countries on any such list to accept the return of most of these claimants, absent their agreement to do so.

To date, Canada has not had any international agreements respecting the return of refugee claimants. For some time, however, the Governments of Canada and the United States have been negotiating an Agreement whereby the country of first arrival would be responsible for determining refugee claims where the claimant had subsequently travelled to the second country and presented a claim. A number of exceptions would apply; some of these would recognize the importance of family reunion and the rights of unaccompanied minors and allow for direct transit through the first country (subject to time limits). The government has also announced that it ultimately intends to seek an agreement with certain European countries.

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(19) The Minister may order at any time that the list (should one be established) be suspended in its entirety or with respect to certain classes of people as the Minister might specify.

(20) With the exception of factor (d), which was added by Bill C-86, all of these criteria have been in the law since 1988. Bill C-86 also added provisions that allow a country to be designated for a maximum of two years at a time, renewable, and which require the Governor in Council to monitor the prescribed countries in relation to the four factors.

As noted, the safe country return aspect of the law has been very controversial and continues to be opposed by many refugee advocacy groups. They voice a number of fears, including the fear that claimants in other countries will not be dealt with fairly, and that the countries to which Canada might return people have third country policies of their own and might immediately send the returnee onward again. Canadian refugee advocates have been strongly opposed to the Canada-U.S. Agreement.

## BOARD OPERATIONS

The initial years of operation of the Board have seen a high number of refugee claims. In the Board's first year of operation, the overall acceptance rate of claims was 76%. This rate dropped steadily; it reached 55% in 1993 before rebounding to 70% in 1994 and 1995.<sup>(21)</sup> In 1996, it fell again, to 58%. Some critics of the Board suggested that the downward trend in the acceptance rate was the result of a calculated effort to tighten up the refugee system, mirroring the enforcement efforts of the previous government. The Board itself pointed to a reduced number of claims from certain source countries whose claimants in the past had received a high number of positive decisions. Others pointed out that Canada's acceptance rate remained the highest in the world. In 1994, when the acceptance rate climbed, some observers suggested that the increases reflected the priorities of the Liberal government elected in 1993 and the kinds of appointment it has made to the Board.

Because the safe country provision has not been operational, only a very low percentage of people have ever been rejected as ineligible to make a claim. Further, the imposition of visitor visas on countries that were producing significant numbers of unfounded refugee claims in the middle 1980s resulted in a relatively small number of manifestly unfounded claims by the time the Board commenced its operations. As a result, only some 4% of claimants were rejected at

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(21) These figures are drawn from the News Releases of the Board, which, until 1996, were produced quarterly. The overall rate of acceptance for 1990 was 70%, for 1991, 64%; and for 1993, 57%. The acceptance rate is the number of positive decisions as a percentage of the total number of claims concluded by a final decision, following a hearing. A significant number of claims are also withdrawn or abandoned.

the access stage of the system, justifying the removal of the cumbersome two-stage hearing process in 1992.

The number of refugee claims in that period that were not weeded out at the access stage and were referred for a full hearing, therefore, greatly exceeded expectations and the Board, which had originally been given resources sufficient to conduct approximately 7,500 full hearings, based on 18,000 claims in total, found itself dealing with a far greater number of claims. In its initial years, as it struggled to meet the unforeseen demands placed on it, the Board both received additional resources from Treasury Board and streamlined its operations. In recent years, the Refugee Division has typically decided between 21,600 and 27,300 claims.

As noted, the Board is the largest administrative tribunal in Canada, with close to 200 Order-in-Council Appointees, some 800 staff, and a budget of \$76.7 million. After guiding the Board through its initial years, its first Chairperson, Mr. Gordon Fairweather, was succeeded in October 1993 by Mrs. Nurjehan Mawani. Mrs. Mawani had been a member of the former Immigration Appeal Board and a Deputy Chair of the Immigration Appeal Division of the Board since 1989.

## ONGOING ISSUES

### A. Decision-Making

In a highly decentralized administrative body with so many members making decisions, it was foreseeable that consistency in decision-making would be problematic. Extensive initial and ongoing training for members has always been an important facet of the Board's work but there has been a recognition that training alone is insufficient. Thus, in certain cases, the Board developed Preferred Position Papers to assist members. As noted above, the amendments to the *Immigration Act* made by Bill C-86 gave a statutory basis to Board guidelines. The amendments also introduced the position of coordinating member, to be appointed at the ratio of one coordinating member to every 15 members of the Refugee Division.

Questions relating to the quality and consistency of decision-making continue to plague the Board. Members are very conscious of their roles as independent decisionmakers, and the pressures for consistency may be either resisted or misinterpreted. This may explain, in part, some of the difficulties between members and the former deputy chair.

Sometimes the inconsistencies in Board decisions are more visible. Amid the controversy over whether refugee claimants from Israel (mostly emigrés from the former Soviet Union) could have valid claims, one point was clear – 75% of such claims were accepted in Quebec, while only 10% were accepted in Ontario.

### **B. Impact of the Hathaway Report**

As noted above, the Hathaway Report closely examined the role of Board refugee hearing officers and, indeed, many facets of Board operations generally. On 3 March 1995, the Board announced a major restructuring of its functions, including the roles of RHOs (re-named RCOs) and members in a hearing, the collection, sources and nature of the information that should be available for hearings, the role of immigration officials, and numerous other matters. The restructuring will likely take a significant period of time, and will be further affected by the move to single-member panels.

### **C. Appointments to the Board**

Members of the IRB are appointed by the Governor in Council. There are no criteria in the Act for the qualifications of appointees and observers of the Board have often been critical of the quality of the appointments, particularly those perceived to be based on patronage. The Hathaway Report recommended that Cabinet should define criteria for appointment to the Board, that initial appointments should be probationary, and that Advisory Committees in each of the Board's regions should be established to consider and recommend appointments. These Committees would be composed of representatives from the Board, the practising bar, the Canadian Council for Refugees, and the government, and would be binding on the Minister.

On 3 March 1995, the Minister of Citizenship and Immigration announced the creation of a seven-member Advisory Committee composed of the Chairperson of that Committee (Mr. Gordon Fairweather), the Chairperson and the two Deputy Chairs of the Board, and three other members appointed by the Minister with advice from Mr. Fairweather. The three other members are chosen from the legal community, non-governmental organizations involved with refugees, and the general public. It is significant that the Minister committed himself not to appoint

or reappoint any member to the Board who had not been recommended by the Committee. It may be assumed that the present Minister, the Hon. Lucienne Robillard, has continued the practice.

#### **D. Gender-Related Issues<sup>(22)</sup>**

As discussed above, the first guidelines developed by the Chairperson under the authority provided by the C-86 amendments concerned gender-related refugee claims. It can be predicted that gender-related claims will continue to be difficult and possibly controversial as the Board and courts develop the caselaw in this area. Meanwhile, the guidelines are being studied around the world and, in some cases, are being used as models by other countries grappling with similar issues.

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(22) For more information on this issue, see *Gender-Related Refugee Claims*, Library of Parliament, BP-370.









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